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No. 90-964

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

SEABOARD LUMBER CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether government contractors, by agreeing to resolve contractual disputes according to the process set forth in the Contract Disputes Act, waive any rights they may have to a jury trial before an Article III judge.

2. Whether claims relating to government contracts implicate "public rights" and may therefore be adjudicated in the first instance by a non-Article III court, sitting without a jury.

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3 W. Blackstone, *Commentaries on the Laws of England* (Philadelphia 1772) 9, 10
1 F. Pollock & F. Maitland, *The History of English Law* (1st ed. 1895) 9, 10

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-21a, is reported at 903 F.2d 1560. The decision of the Claims Court, Pet. App. 28a-51a, is reported at 15 Cl. Ct. 366.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1990. Pet. App. 24a. A petition for rehearing was denied on September 18, 1990. Pet. App. 23a. The petition for a writ of certiorari was filed on December 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are logging companies which entered into contracts with the Forest Service to cut, remove, and pay for specified timber from national forests within an agreed upon period of time. Petitioners failed to perform those contracts and a contracting officer issued final decisions assessing damages for the difference between the contract price and the retail price of the remaining timber. Pet. App. 2a, 30a.

Petitioners appealed the contracting officer's decisions by filing suit in the Claims Court (a non-Article III court) pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*[1] In its answers, the government asserted counterclaims for the amounts assessed by the contracting officer. Pet. App. 2a.

Petitioners moved for dismissal of the government's counterclaims, or, alternatively, that juries be empaneled to hear their cases. Petitioners contended that Article III requires government contract claims to be tried before an Article III judge and that the Seventh Amendment requires the fact-finder in such cases to be a jury. Pet. App. 2a. The Claims Court and the Federal Circuit rejected petitioners' contentions.

1. The Claims Court held that its exercise of jurisdiction over petitioners' appeals did not violate Article III or the Seventh Amendment. Pet. App. 28a-51a. First, it observed that claims arising out of government contracts were not actions at common law "such as would fall solely within the Article III judicial power." *Id.* at 42a; see *id.*

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[1] The Contract Disputes Act of 1978, as amended by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 27 (codified at 28 U.S.C. 171-177), permits a contractor to appeal the contracting officer's final decision either by seeking review in the agency's board of contract appeals, 41 U.S.C. 606, or by filing an action in the United States Claims Court, 41 U.S.C. 609(a)(1).

at 35a-43a. Second, the court determined that actions concerning government contracts are matters of "public rights" that may be resolved within the Executive Branch consistent with Article III. *Id.* at 43a-49a. Third, the court held that government contract claims are not "suits at common law" for which the Seventh Amendment affords a right to a jury trial. Pet. App. at 49a-51a. The court certified the case for interlocutory appeal under 28 U.S.C. 1292(d)(2). Pet. App. 51a.

2. The court of appeals accepted the interlocutory appeal and affirmed. Pet. App. 1a-21a. It held that petitioners, by entering into contracts agreeing to "specific procedures for dispute resolution, none of which entail a jury trial in an Article III court," *id.* at 13a, "voluntarily and knowingly waived" any rights they might have had under Article III or the Seventh Amendment, Pet. App. 13a; see *id.* at 8a-15a. To the extent that petitioners asserted *statutory* rights (under the Contract Disputes Act) to an initial hearing in an Article III court or to a jury trial, the court held that petitioners' challenge implicated the sovereign's immunity from suit except on the terms chosen by the sovereign:

> In sum, it is only as a matter of legislative grace that [petitioners] ha[ve] access to any Article I or III forum. Before Congress' restriction of the government's contract options, the government, by contract provisions, could and did avoid litigation of the merits of its contract claims in any tribunal. Thus, the basis for [petitioners'] suit in the Claims Court is a statutory right, which involves a waiver of sovereign immunity. That review is *de novo*, rather than limited, is also a matter of legislative grace. [Petitioners are] not, as [they] would have it, merely facilitating the government's obligation to litigate a contract claim for a determination of the government's rights. [Petitioners are] as-

> serting [their] own right, a right to review that is given to [them] by the contract provisions incorporating the [Contract Disputes Act] which waives sovereign immunity to that extent.

Id. at 20a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Further review is not warranted.

1. Petitioners allege that a contractor against whom the government asserts a contractual claim is entitled to a jury trial before an Article III court. As this Court noted in *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986), Article III protects two interests: (1) "the role of the independent judiciary within the constitutional scheme of tripartite government," and (2) a litigant's "right to have claims decided before judges who are free from potential domination by other branches of government." 478 U.S. at 848.

a. Taking the second point first, the Court ruled in *Schor* that "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver." 478 U.S. at 848-849. The personal right to trial by jury also is subject to waiver. See *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968); Fed. R. Civ. P. 38(d). Here, petitioners waived any personal rights they may have had to an Article III forum and to a jury trial.

When petitioners entered into their contracts, they agreed to resolve *all* disputes – including "claim[s] by the Government," "arising under or relating to"[2] their contracts – in

[2] Each of petitioners' contracts as originally executed or later amended contained the standard Forest Service contract disputes clause, which provides, in pertinent part:

> (a) This contract is subject to the Contract Disputes Act of 1978 (Pub. L. 95-563).

accordance with the Contract Disputes Act, without an initial adjudication by an Article III judge. Moreover, petitioners well understood that the former Court of Claims never empaneled a jury on either contractor or government claims. See *Maryland Casualty Co.* v. *United States*, 141 F. Supp. 900, 906 (Ct. Cl. 1956) (Jones, C.J., concurring) (contractor charged with knowledge that government contract disputes "shall be tried * * * without a jury, [and] such a contractor voluntarily and knowingly agrees to such forum in respect to the trial of any issues arising out of the operations under the contract"). The same is true under the Claims Court, the successor to the Court of Claims. Thus, petitioners waived any rights to an Article III judge and to a jury trial by voluntarily entering into contracts with the knowledge that all disputes—including claims by the government—would be resolved in the first instance by a non-Article III tribunal, without a jury. See generally *Geldermann, Inc.* v. *Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987) (commodity brokerage firm waived any Article III rights when it joined board of trade with rules requiring arbitration of customer claims), cert. denied, 488 U.S. 816 (1988).

Contrary to petitioners' suggestion, Pet. 3-4, see Pet. App. at 13-14, 28, passage of the Federal Courts Improvement

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(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this provision.

. . . . . .

(c) (iii) . . . A claim by the Government against the contractor shall be subject to a decision by the Contracting officer.

. . . . . .

(f) The contracting officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

Pet. App. 31a.

Act in 1982 did not diminish the role of Article III courts in adjudicating government contract disputes. Before 1982, a government contractor received an initial adjudication of its claims by a non-Article III decisionmaker—either a Court of Claims trial judge (not an Article III judge) or an agency board of contract appeals. This initial decision could then be appealed to the Court of Claims, an Article III court, which reviewed the factual findings in the initial decision under a "presumption of correctness" standard. *Davis* v. *United States*, 164 Ct. Cl. 612, 616-617 (1964). Since 1982, a contractor has received an initial adjudication by a non-Article III decisionmaker—the Claims Court or the agency board of contract appeals. That decision is reviewable by the United States Court of Appeals for the Federal Circuit, an Article III court, on a *de novo* standard as to issues of law, but on a "clearly erroneous" standard as to questions of fact. *Milmark Services, Inc.* v. *United States*, 731 F.2d 855, 857 (Fed. Cir. 1984).

Even if the change from the Court of Claims to the Claims Court affected the validity of the petitioners' contractual waivers, that change affected only those contracts entered into between 1979 and 1982—*i.e.*, between the effective dates of the Contracts Disputes Act and the Federal Courts Improvement Act. After 1982, any government contractor entering into a contract subject to the Contract Disputes Act would clearly have waived its personal rights to an Article III forum.[3]

b. In *Schor*, this Court held that the Article III interest in the "institutional integrity of the Judicial Branch" may not be waived. 478 U.S. at 851. This "structural principle" of Article III, 478 U.S. at 850, however, is not violated by

[3] Four of petitioners' contracts were executed after 1982. See Pet. App. 30a n.4.

the assignment of initial adjudication of government contract claims to agency boards or the Claims Court.

Article III does not "confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Schor*, 478 U.S. at 848. In reviewing Article III challenges, this Court considers "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts" and "the origins and importance of the right to be adjudicated." *Id.* at 851. In the case of a government contract claim, an agency board of contract appeals or the Claims Court decides nothing traditionally reserved to Article III courts.

In *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), the Court held that Article III did not bar Congress's creation of summary procedures, outside Article III courts, to collect a debt due the government from one of its customs agents, because such actions had not historically been tried in Article III courts. 59 U.S. (18 How.) at 281. Such actions, the court reasoned, were not traditionally matters for common law judges or Article III courts. 59 U.S. (18 How.) at 277-282. The Court in *Murray's Lessee* specifically discussed contract debts allegedly owed to the government, observing that "[w]e apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown." *Id.* at 277. The Court observed that contract debts owed the sovereign could be summarily collected by a so-called "writ of extent." *Ibid.* "In regard to debts due [the king] upon simple contract * * * the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt. This commission being returned, the debt found was thereby evidenced by a record [in the king's exchequer], and an extent could issue thereon."

Id. at 277-278. Hence, the Court concluded that a distinction "between public defaulters and ordinary debtors was understood in this country * * * before the formation of the constitution of the United States." *Id.* at 278.[4]

Since *Murray's Lessee*, contract disputes with the government traditionally have been settled outside an Article III forum. See, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742 (1948) (Congress selected non-Article III forum to decide whether contractors made "excessive profits" that must be returned to the Treasury). Indeed, as the court of appeals noted, Pet. App. 9a-13a, for many years the standard government contract included a disputes clause providing that agency decisions on questions of law and fact were final. See *United States* v. *Wunderlich*, 342 U.S. 98 (1951); *United States* v. *Moorman*, 338 U.S. 457 (1950).

Thus, petitioners' assertion, Pet. 22-23, that the court of appeals erred in not considering the non-waivable "structural principle" of the separation of powers protected by Article III, *Schor*, 478 U.S. at 850-851, is incorrect. No threat to separation of powers is posed because government contract claims—both by and against the government—historically have been the province of the Executive Branch. Adjudication of claims arising under government contracts does not risk "the aggrandizement of [executive] power at the expense of a coordinate branch." *Schor*, 478 U.S. at 856. Nor does it represent "an attempt by [the executive] to increase its own powers at the expense" of the Judiciary. *Morrison* v. *Olson*, 487 U.S. 654, 694 (1988). If "Congress would be free to commit such matters completely to non-judicial executive determination, * * * [then] there can be

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[4] Contrary to petitioners' suggestion, Pet. 18, the holding of *Murray's Lessee* is not premised upon the relationship between the Government and its employees. See *Phillips* v. *Commissioner*, 283 U.S. 589, 596 (1931).

no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion); see *United States* v. *Rush*, 804 F.2d 645, 647 (Fed. Cir. 1986) (no right to an Article III forum in cross-claim brought by the government for recovery of money paid to a construction contractor); *United States* v. *Ulvedal*, 372 F.2d 31 (8th Cir. 1967) (Blackmun, J.) (summary enforcement of government claim against contractor where no appeal taken by contractor).

Petitioners' reliance on Blackstone, Pet. 10, for their view that claims asserted by the government under contract are analogous to actions at "common law" and require resolution by an Article III court, is misplaced. As Blackstone made plain, the English Crown sued its subjects for debts on contracts in the Court of the Exchequer by filing an "Information." 3 W. Blackstone, *Commentaries* *-261. Although the Court of the Exchequer was both a court of law and a court of equity, Blackstone explained that cases involving the King's debtors were called to answer in the court of equity. *Id.* at 44; see also 1 F. Pollock & F. Maitland, *The History of English Law* 170-171 (1st ed. 1895) (describing the business of the Exchequer in "call[ing] the king's debtors before it" as the work of "an administrative tribunal"). Thus, claims by the sovereign against a subject arising out of contract were hardly "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Northern Pipeline Constr. Co.*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment).

Finally, the government contractor's right to appeal to the Federal Circuit (an Article III court) satisfies any remaining Article III concern. See *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 592-593 (1985)

(noting appellate review as a factor in holding that binding arbitration does not contravene Article III); *Schor*, 478 U.S. at 851 ("extent to which the 'essential attributes of judicial power' are reserved to Article III courts" via appellate review is a factor in holding agency adjudication of state common-law counterclaims constitutional under Article III). The Constitution, therefore, does not require an Article III court to adjudicate all aspects of a dispute between the government and a contractor.

2. Petitioners clearly have no right to a jury trial. The Seventh Amendment provides: "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *." This Court has made it clear that "the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791." *Curtis* v. *Loether*, 415 U.S. 189, 192-193 (1974).

As explained above, the sovereign's contractual claims were not actions at common law in 1791 England. See 3 W. Blackstone, *supra*, at *-261; 1 F. Pollock & F. Maitland, *supra*, at 170-171. To the contrary, such claims have always been matters of "public right" within the province of the Executive Branch, *Murray's Lessee*, 59 U.S. (18 How.) at 272; *Rush*, 804 F.2d at 647, and Congress is free to provide for adjudication of such disputes without recourse to a jury, *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2796 (1989); see *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 453-455 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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